Tentative Rulings for July 28, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

15CECG02625 ***Sanno Ranch LLC v. Global Pacific Nursery (*****Dept. 402)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

15CECG01371 ***Astone v. St. Agnes Medical Center*** **will be continued to Thursday, August 10, 2016 at 3:30p.m. in Dept. 403.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

03 **Tentative Ruling**

Re: ***Mabrey v. Abbott***
Case No. 14 CE CG 01585

Hearing Date: July 28th, 2016 (Dept. 402)

Motion: Petition to Compromise Minors' Claims

Tentative Ruling:

To deny the petition to compromise the minors' claims, without prejudice, unless plaintiffs' counsel appears and explains the discrepancies with the petition listed below.

Explanation:

The court still has some concerns with the petition. First, the settling defendant, Central California Faculty Medical Group, dba University Oncology Associates, has filed a motion for summary judgment as to all of plaintiffs' claims, and that motion is still on calendar. Defendant Abbott is also moving for summary judgment as part of the same motion. It is unclear why defendants are moving for summary judgment if they have agreed to settle the claims against them.

Also, the settlement agreement attached to the petition does not include any signatures from defendants. The only signatures are from plaintiffs' guardian ad litem and plaintiffs' counsel. Therefore, it does not appear that the settlement would be enforceable under Code of Civil Procedure section 664.6 if defendant later reneged and refused to pay the settlement money.

In light of the pending summary judgment motion and the lack of enforceability of the settlement agreement, it possible that plaintiffs will end up in a situation where defendants have been dismissed by summary judgment and plaintiffs will not be able to enforce the settlement. This will leave plaintiffs with nothing. Clearly, this would not be in the best interest of the minors. Therefore, the court will not approve the minor's compromise petition until plaintiffs' counsel appears and clarifies the situation with regard to the pending summary judgment motion and the lack of defendants' signatures on the settlement agreement.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 7/27/16 .
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Green Tree Servicing v. Ismail Ali, et al.***
Superior Court Case No. 14CECG02416

Hearing Date: July 28, 2016 (Dept. 402)

Motion: Default Prove Up

Tentative Ruling:

To deny without prejudice.

Explanation:

Plaintiff has not filed a Request for Entry of Court Judgment, and the Court may not proceed without it. Should Plaintiff calendar another hearing, the Court expects a default packet that complies with California Rules of Court, rule 3.1800, and the Superior Court of Fresno County, Local Rules, rule 2.1.14, be submitted at least ten court days prior to the hearing in order to avoid unnecessary consumption of time at the hearing. The Court also directs Plaintiff's attention to its order issued February 10, 2016, denying Plaintiff's previous application for default judgment, for guidance in preparing the default packet.

Pursuant to California Rules of Court, rule 3.1312, subd. (a), and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 7/27/16 .
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Zinc Auto Finance, Inc. v. Jacobo***
Superior Court Case No.: 13CECG03169

Hearing Date: July 28, 2016 (**Dept. 402**)

Motion: Recall bench warrant

Tentative Ruling:

To take the hearing off calendar, as no moving papers were filed.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 7/27/16 .
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Maciel v. Bar 20 Dairy LLC***
Court Case No. 15CECG00475

Hearing Date: July 28, 2016 (Department 402)

Motion: by plaintiff for class certification and preliminary approval of class settlement

Tentative Ruling:

To deny, without prejudice. To vacate the trial date and designate same as a hearing date for contested certification motion.

Explanation:

The Court's previous order advised the parties that they were required to submit evidence in the form of declarations from defendant, depositions, or verified discovery responses which showed certain facts. The additional papers filed include none of the required evidence. Instead, all that is offered are emails from defense counsel purporting to answer certain questions, and a statement by plaintiff's counsel that he received some discs of information. An email from an attorney and unauthenticated computer discs are not admissible evidence, and the motion is denied for lack of the required evidence.

The Court's previous order also indicated it would not approve a settlement with a release of claims broader than those arising out of the identical factual predicate alleged in the operative pleading. See *Matsushita Elec. Indus. Co. Ltd. v.* Epstein (1996) 516 U.S. 367, 376-377. Yet paragraph 5 of the new settlement agreement defines claims to be all those "arising out of or related to" those in the pleading, in addition to those set forth in Article X of the stipulation. At 30:7-13, the parties state that the settlement will apply even if facts and claims are different than those known to them. The Court's previous order stated it would not approve a release which included unknown claims, one which provided for cy pres distribution other than as set forth in Code of Civil Procedure section 384, inclusion of an individual release in the claim forms, or a provision calling for attorney's fees in a dispute over the settlement. The parties continue to include such terms, and approval is denied on that basis as well.

No basis for the use of a claim form is provided, and none appears other than the use of such process to trigger reversion of settlement funds to the defendant, which is not in the interests of the class members. At 18:24-27, the settlement allows counsel to approve a delay in mailing of settlement checks by the administrator, who would instead be required to seek permission for any delay from the Court.

There is no evidence showing that the proposed class representatives can adequately represent those who were in job titles other than their own. In particular, it would seem likely that those working as irrigators or in the farm shop would be skilled

workers with higher pay. Use of a single average pay for all workers has not been shown to be reasonable..

There is no evidence of how the "random" sample of documents was chosen by defendants, or of how the further random sample of such documents was chosen by plaintiff's counsel. In *Duran v U.S. Bank National Assn.* (2014) 59 Cal. 4th 1, 22, the defense statistics expert:

> ". . . explained that simply drawing a random sample is not sufficient to produce an unbiased and accurate estimate about an underlying population. To be reliable, the sample must be sufficiently large and free from bias caused by various sampling errors. Here, the sample size was too small. Hildreth explained that, before a sample is selected, a pilot study is typically done to determine the amount of variation in the underlying population. Based on this pilot study, experts can estimate the standard deviation in the population and then, using the desired margin of error, calculate the optimal sample size. Although both sides' experts had proposed such a study, none was done before the court decided to pick 20 class members for the sample."

It overturned a verdict in favor of the class because it found that "the court improperly extrapolated liability findings from a small, skewed sample group to the entire class." (*Id*. at 33.) And see same at 38 (internal citations and quotes omitted):

> "Sampling is a methodology based on inferential statistics and probability theory. The essence of the science of inferential statistics is that one may confidently draw inferences about the whole from a representative sample of the whole. Whether such inferences are supportable, however, depends on how representative the sample is. Inferences from the part to the whole are justified *only* when the sample is representative. Several considerations determine whether a sample is sufficiently representative to fairly support inferences about the underlying population"

For Mr. Woolfson's findings to be acceptable as evidence, the parties would have to submit a declaration from an expert who can establish that the records produced by defendant were in fact a valid random sample from which information as to workers in each job title can be extrapolated. And that expert need also detail and validate the further sampling done by plaintiff's counsel.

Such issues also affect the figures presented to show potential damages, which are drawn from the same documents. In any case, the parties still have failed to adequately explain why a more than 90% discount on the value of the claims is proposed for the settlement figure, especially in light of the fact that the actual workers may get less than 4% when the reversion provision is considered.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 7/27/16 .
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Gleason v. Gill et al.***
Court Case No. 15 CECG 00576

Hearing Date: July 28, 2016 (Dept. 402)

Motion: Dr. Gill's Motion for Summary Judgment/Adjudication

Tentative Ruling:

To deny.

Explanation:

Burden on Summary Judgment

In ruling on a motion for summary judgment or summary adjudication, the court must "consider all of the evidence' and all of the 'inferences' reasonably drawn there from and must view such evidence and such inferences 'in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) In making this determination, courts usually follow a three-prong analysis: identifying the issues as framed by the pleadings; determining whether the moving party has established facts negating the opposing party's claims and justifying judgment in the movant's favor; and determining whether the opposition demonstrates the existence of a triable issue of material fact. (*Lease & Rental Management Corp. v. Arrowhead Central Credit Union* (2005) 126 Cal.App.4th 1052, 1057-1058.)

As the moving party, defendant "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.) If Dr. Gill meets this burden, then the burden of production shifts to plaintiff "to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid*.)

A defendant who seeks a summary judgment must define *all* of the theories of liability alleged in the complaint and challenge *each* factually; if the defendant fails to do so, he or she does not carry the initial burden of showing the nonexistence of a triable issue of material fact. (*Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1165; *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 714.)

First Cause of Action – Medical Malpractice

Medical providers must exercise that degree of skill, knowledge, and care ordinarily possessed and exercised by members of their profession under similar circumstances. (*Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, 108, fn. 1.) Thus, in "'any medical malpractice action, the plaintiff must establish: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his

profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." [Citation.]'" (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.)

Typically, when defendant in a medical malpractice action moves for summary judgment and supports motion with an expert declaration opining that his conduct fell within the community standard of care, he is entitled to summary judgment unless plaintiff comes forward with conflicting expert evidence. (*Munro v. Regents of Univ. of Cal*. (1989) 215 Cal.App.3d 977, 983-985.)

However, an expert's declaration submitted in connection with a summary judgment motion must not be speculative, lacking in foundation, and must be made with sufficient certainty. "It is sufficient, if an expert declaration establishes the matters relied upon in expressing the opinion, that the opinion rests on matters of a type reasonably relied upon, and the bases for the opinion. [Citation.]" (*Sanchez v. Hillerich & Bradsby Co*. (2002) 104 Cal.App.4th 703, 718.) A defendant's expert declaration must be detailed, explaining the basis for the opinion and the facts relied upon. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 125; *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 521, 524–525.) Moreover, because expert opinion may not be based on assumptions of fact that are without evidentiary support and experts may not recite hearsay as fact, properly authenticated medical records reviewed by the experts must be included in the motion for summary judgment. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743.)

Under these standards, the Declaration of Dr. Mark Genovese, defendant Dr. Gill's medical expert is sufficient. Plaintiff also attacks the authenticity of the medical records relied on by Dr. Genovese, arguing that the declaration of defense counsel that the medical records are "true and correct copies" is insufficient. Such an authentication would be insufficient. However, the medical records are also authenticated by the Declaration of Joanne Austrum, the authorized records custodian of Himmat S. Gill, M.D., who makes a sufficient showing under Evidence Code section 1271, commonly known as the business records exception to the hearsay rule. This objection is overruled.

Plaintiff next challenges the paragraph 11(F) of Dr. Genovese's Declaration, which states "The literature provided to Mr. Gleason clearly indicates that there is an association between Humira and nervous systems problems, Specifically, the product insert for Humira states …" Plaintiff's objections are based on lack of foundation, speculation, and improper subject of expert testimony. Plaintiff contends that Dr. Genovese fails to explain how he has personal knowledge of the contents of literature that was allegedly provided to plaintiff. This objection has some superficial merit. Dr. Genovese was apparently not at the October 20, 2010 appointment at which the literature was given to plaintiff. He does not state that his copy of the literature was authenticated in discovery. However, in paragraph 9 of his Declaration, Dr. Genovese states that he reviewed the Declaration of Dr. Gill. Paragraph 8 of the Declaration of Dr. Gill restates the text of the Humira literature given to plaintiff. Dr. Gill would rationally

know what a product insert he gave said and plaintiff has made no objection to this evidence. Accordingly, this objection is overruled.

Plaintiff next challenges the product insert itself as lacking foundation. (Genovese Decl. at ¶ 11(f), lines 27-28.) For the reasons stated above, Dr. Genovese has not provided a proper authentication of the Humira product literature and this objection is sustained.

Finally, plaintiff challenges Dr. Genovese's expert conclusions that Dr. Gill met the applicable standard of care in Mr. Gleason's treatment. At paragraphs 13(A)-(F) as lacking in foundation and as improper expert opinion because these opinions rest entirely on the medical records of plaintiff and the Humira insert, both of which plaintiff believes are inadmissible. First, the medical records are fully admissible, as set forth above. Second, the relevant portion of the Humira insert is admissible, as set forth above. Accordingly, Dr. Genovese's expert opinion that Dr. Gill met the standard of care in his care and treatment of plaintiff is admissible. Dr. Gill met his burden of production on summary judgment and the burden of production flips to plaintiff.

Plaintiff raises several issues of fact he claims are material and disputed.

Failure to Examine Plaintiff: [1]

The failure to examine plaintiff is not among the allegations of medical negligence included in the complaint, which rest solely on the failure to: "warn [plaintiff] that using Humira could cause new onset multiple sclerosis at the time Dr. Gill prescribed Humira to Gary in October 2010 or at any time after [plaintiff] began taking the drug, or disclose alternative treatment options to [plaintiff]. By failing to warn [plaintiff] of the potential for developing multiple sclerosis, and by failing to disclose alternative treatment options, Dr. Gill's knowledge, skill, care, and treatment of [plaintiff] fell below the standard of care." (First Amended Complaint ¶ 55.) "A party cannot resist summary judgment by raising issues outside the pleadings." (*Prince v. Sutter Health Central* (2008) 161 Cal.App.4th 971, 978; *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648 ["the pleadings set the boundaries of the issues to be resolved at summary judgment"; the motion " 'cannot be successfully resisted by counter-declarations which create immaterial factual conflicts outside the scope of the pleadings' "].)

To the extent that plaintiff raises the lack of physical examinations at his visits with Dr. Gill to try to create triable issues of material fact to contradict the medical records of Dr. Gill which were relied on by Dr. Genovese, and incorporated in Dr. Genovese's Declaration, the attempt fails. The issue of whether Dr. Gill personally examined plaintiff is not material to the issue of whether he warned plaintiff about the benefits, risks and indications of Humira and creating uncertainty as to whether plaintiff was examined by Dr. Gill does not undermine Dr. Genovese's ultimate conclusion that Dr. Gill's warning was within the standard of care.

[1] This evidence is raised with respect to Undisputed Material Fact Nos. 4, 6, 13 and 18.

Failure to Provide the Humira Product Insert:[2]

In plaintiff's Declaration, he flatly denies receiving Humira literature during the October 20, 2010 visit with Dr. Gill, which is the visit Dr. Gill at which charted giving plaintiff the literature. (Plaintiff Decl. at ¶ 9 ["I did not receive Humira literature during this meeting."].) However, plaintiff cannot contradict the judicial admissions that he received "warning information" about Humira at the time of he was "first prescribed" with specific "language" made in his First Amended Complaint at paragraphs 39 and 40:

> 39. Although the warning information provided to [plaintiff] when he was first prescribed Humira refers to demyelinating disease, the language provided is woefully inadequate to fully inform patients about the risk of neurological problems in patients who had not previously experienced such problems.
> 40. In contrast, labels for other TNF blockers contain much stronger warnings about the risk of central nervous systems demyelinating disorders. …

"A defendant moving for summary judgment may rely on the allegations contained in the plaintiff's complaint, which constitute judicial admissions. As such they are conclusive concessions of the truth of a matter and have the effect of removing it from the issues." (*Uram v. Abex Corp*. (1990) 217 Cal.App.3d 1425, 1433.)

Accordingly, plaintiff's Declaration testimony to the effect that he did not receive any Humira literature fails to create a triable issue of material fact.

Failure to Discuss the Side-Effects and Alternatives to Humira:[3]

Dr. Gill's alleged negligent failure to disclose the risks of Humira and alternatives to treatment with Humira is an allegation of the First Amended Complaint. (First Amended Complaint at ¶¶ 54-56.) Plaintiff's Declaration states, that on July 7, 2010, the date that Dr. Gill charted he discussed the risks and benefits of Humira with plaintiff, "Dr. Gill did not say why he wanted to switch my medication, why I should take Humira, what alternative treatments were available, or what risks were associated with taking Humira." (Plaintiff Decl. at ¶ 8.) This contradicts the medical records of Dr. Gill, the Declaration of Dr. Gill at paragraphs 5 and 6, and disputes a key fact relied on by Dr. Genovese at paragraph 11(D), namely, that Dr. Gill advised of the risks of, and alternatives to, Humira. As such, plaintiff has raised a triable issue of material fact as to the first cause of action for medical malpractice, and summary judgment must be denied.

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[2] This evidence is raised with respect to Undisputed Material Fact Nos. 8, 9, 16, 17, and 18.
[3] This evidence is raised with respect to Undisputed Material Fact Nos. 7, 13, 14, 16, 17, and 18.

Second Cause of Action – Failure to Obtain Informed Consent

The material allegations of the second cause of action for failure to warn are the same as the first cause of action for medical malpractice: both allege that Dr. Gill failed to advise plaintiff that Humira could cause new onset multiple sclerosis and failed to advise plaintiff of alternative treatment options. Accordingly, plaintiff's having raised a triable issue of material fact as to whether plaintiff was told about alternative treatment options to Humira renders summary adjudication inappropriate as to this cause of action for the reasons set forth with respect to the first cause of action.

Tenth Cause of Action – Negligent Infliction of Emotional Distress

There is no independent tort of negligent infliction of emotional distress. (*Potter v. Firestone Tire & Rubber Co*. (1993) 6 Cal.4th 965, 984.) It is merely the tort of negligence. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 884.) Therefore, the motion for summary adjudication of this cause of action fails for the reason expressed with respect to the first cause of action.

Eleventh Cause of Action – Loss of Consortium

A claim for loss of consortium, while separate, is still "by its nature, dependent on the existence of a cause of action for tortious injury to a spouse ..., [and] it stands or falls based on whether the spouse of the party alleging loss of consortium has suffered an actionable tortious injury. [Citations]." (*Leonard v. John Crane, Inc*. (2012) 206 Cal.App.4th 1274, 1288, citing *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 746.) Because Dr. Gill attacked the loss of consortium claim by seeking to undermine plaintiff Gary Gleason's causes of action, plaintiff Gary Gleason's ability to establish a triable issue of material fact makes summary adjudication inappropriate as to this cause of action as well.

Evidentiary Objections of Dr. Gill

The Court declines to rule on the evidentiary objections of Dr. Gill as they are not material to the resolution of this motion. (Code Civ. Proc., § 437c, subd. (q).) The Court likewise declines to consider any new evidence sought to be introduced on reply. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.)

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 7/27/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

(24) **Tentative Ruling**

Re: ***State of California v. Vie-Del Company***
Court Case No. 15CECG00681

Hearing Date: **July 28, 2016 (Dept. 403)**

Motion: Motion for Order for Possession

Tentative Ruling:

To grant, with revision to plaintiff's proposed Order for Possession to strike the phrase "on July 28, 2016, or" at pages 2:27-3:1 and page 3:6 and the phrase "whichever is later" at page 3:2 and 3:7.

In the event oral argument is requested it will be held on Tuesday, August 2, 2016 at 3:30 p.m. in Dept. 403.

Explanation:

The motion satisfies all the statutory requirements. The requirement of entitlement to the taking and sufficient deposit are met. Opposition has been filed, but defendants objected only to the timing of possession and have not argued that possession will pose any hardship. The motion establishes the severe hardship plaintiff will face if it does not obtain a prejudgment order for possession. Thus, there is an overriding need for the plaintiff to possess the property prior to the issuance of final judgment, and the plaintiff will suffer a substantial hardship if the application for possession is denied or limited. (Code Civ. Proc. § 1255.410, subd. (d)(2).)

However, Code of Civil Procedure section 1255.450, subdivision (b) requires that where the property is occupied by a farm or business operation, the time for possession shall not be less than 30 days prior to the time possession is to be taken. Therefore, the Order will be revised in keeping with that requirement.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary, other than as set forth above. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 7/26/16 .
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Ferguson v. MRO Investments, Inc., et al.***

Case No. 15CECG02501

Hearing Date: July 28, 2016 (Dept. 403)

Motion: By Defendants MRO Investments, Inc. for Protective Order for Rent to Be Paid Into Escrow Account.

Tentative Ruling:

To deny the motion.

Note- In the event oral argument is requested it will be held on Tuesday, August 2, 2016 at 3:30 p.m. in Dept. 403.

Explanation:

Defendant MRO Investments is moving for a protective order to have rents charged to Plaintiff Anita Ferguson during this action and placed in escrow. Defendant makes the motion pursuant to Code of Civil Procedure §1170.5, subdivision (c) which is applicable to unlawful detainer cases. Subdivision (c) states:

> If trial is not held within the time specified in this section, the court, upon finding that there is a reasonable probability that the plaintiff will prevail in the action, shall determine the amount of damages, if any, to be suffered by the plaintiff by reason of the extension, and shall issue an order requiring the defendant to pay that amount into court as the rent would have otherwise become due and payable or into an escrow designated by the court for so long as the defendant remains in possession pending the termination of the action.

As noted by Defendant, and not contradicted by the Plaintiff, this may be applied to a delay occasioned by consolidation, such as here. (*Martin-Bragg v. Moore* (2013) 219 Cal.App.4th 367, 393.)

Therefore, in order to obtain such a protective order, Defendant, as the plaintiff in the unlawful detainer action, must show a likelihood of success on the merits and provide an evidentiary basis for the damages (in this case, the fair market rental value of the property).

Likelihood of Success

Defendant first argues that Plaintiff Ferguson is not likely to prevail on her claim as to title in the property because, in probate court, the probate was denied on the basis that there was nothing to probate. (*See* Request for Judicial Notice ("RJN") Exhs. B and C.) Defendant argues that "If the probate court believed that the Agreement [alleged to grant Plaintiff an interest in the subject property] was valid and did not terminate when Fleming defaulted, then there would have been at least a one-half interest in the Property to probate in Fleming's estate." (Memorandum of Points and Authorities at p. 6.) However, as noted by Defendant, the Probate Court also noted that probate could be required were Plaintiff successful in the civil action. (RJN, Exh. C.) Further, there is no evidence that the probate court actually adjudicated these issues. As such, these documents are irrelevant to the present case and the Court declines to grant the Request for Judicial Notice.

Defendant next argues that Plaintiff is not likely to prevail on the 2004 Purchase Agreement because Plaintiff failed to provide payments under the Agreement and, therefore, lost any right to claim an ownership interest under the agreement. Defendant cites to no legal authority for this argument. As Plaintiff notes, if the Agreement is a conditional sale agreement, then the relationship between the parties is one of seller and buyer, not of landlord and tenant. (*Goetze v. Hanks* (1968) 261 Cal.App.2d 615, 617.). And in such a case Plaintiff has the right or option to pay the entire price and amounts due. (*Petersen v. Hartell* (1985) 40 Cal.3d 102, 106.)

Defendant has argued that Plaintiff is "unlikely to come up" with the money in order to redeem the property. (Defendant's reply brief at p. 2.) However, Defendant bases this assertion on "judicial admissions" that Plaintiff stopped making payments in the past because of poverty and illness. (Reply at p. 2.) Defendant has offered no evidence to show that Plaintiff is unlikely to make such payments presently or at a relevant point in the future.

Finally, Defendant has argued that Plaintiff's claim for acquisition via adverse possession is unlikely to succeed because there was no allegation in the First Amended Complaint that possession was hostile and adverse. (Memo of Points and Auths. at p. 5.) However, Defendant has pointed to no evidence that the possession was not hostile or adverse, as would be necessary, since Defendant has the burden of proof on this motion.

For all of these reasons, Defendant has not shown a likelihood of success on the merits.

Evidentiary Support for the Rental Value

Defendant has presented a declaration of Maria Barragan in support of the valuation of the fair market rent of the subject property. Ms. Barragan declares that she has ten years of experience as someone in the business of determining rents for single-family homes. (Barragan Declaration at ¶¶ 2-3.) She also claims she uses Appfolio for determining fair market value, and explains some of the sources for Appfolio's

calculations. (Barragan Decl. ¶5.) She also claims she uses Craigslist and Zillow. (Barragan Decl. ¶6.)

Plaintiff charges that Ms. Barragan has not provided a sufficient basis for her claim for being an expert. However, that seems belied by her experience and employment history. What is problematic is the following: first, there is nothing to indicate that the subject property is a single family dwelling, and, thus, within Ms. Barragan's expertise; second, there is no evidence that Appfolio is reasonably used and relied upon within the industry; third, there is no evidence explaining what Zillow or Cragislist are or how one uses them to determine fair market rentals; and, finally, there is no declaration that Ms. Barragan actually used these tools in determining the fair market value. As a result, her conclusion regarding the fair market value cannot be relied upon.

Notice of Motion

Plaintiff objects to the motion on the grounds that the notice is procedurally improper because it does not meet the statutory requirements that the grounds of the motion must be stated in the notice. (Code Civ.Proc. §1010.) However, as pointed out by Defendant, the grounds appeared in the accompanying documents and, therefore, Plaintiff has experienced no prejudice as a result. (*Shields v. Shields* (1942) 55 Cal.App.2d 579, 584-85.) Therefore, Plaintiff's objection is overruled.

For all of the foregoing reasons, the motion is denied.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 7/26/16 .
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Doe v. Clovis Unified School District, et al.***

Case No. 15CECG00042

Hearing Date: July 28, 2016 (Dept. 403)

Motion: By Plaintiff Jane Doe, a minor, by and through her Guardian ad Litem Tiffany Doe, and Tiffany Doe, for Summary Adjudication of Plaintiff's Fourth Cause of Action, Deprivation of Rights Under the Due Process Clause of the Fourteenth Amendment.

Tentative Ruling:

To deny the motion.

In the event oral argument is requested it will be held on Tuesday, August 2, 2016 at 3:30 p.m. in Dept. 403.

Explanation:

The Court notes that Plaintiff makes note of a "Lodging of Exhibits." No such document appears in the Court's files.

Plaintiff moves for summary adjudication as to the Fourth Cause of Action for Deprivation of rights under the Due Process Clause of the Fourteenth Amendment on the grounds that her rights were violated when she was given an exclusion letter pursuant to Penal Code section 626.4 absent a pre-exclusion hearing. Because there is at least a question of fact as to whether Plaintiff was entitled to such a hearing, the motion is denied.

Where a plaintiff is the moving party, the burden is to produce admissible evidence on each element of a cause of action entitling it to judgment. (*S.B.C.C., Inc. v. St. Paul Fire & Marine Ins. Co.* (2010) 186 Cal.App.4th 383, 388.) Plaintiff must produce evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not. (*LLP Mortg. v. Bizar* (2005) 126 Cal.App.4th 773, 776.) If the plaintiff bears the burden, it shifts to the defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (Cal.Civ.Proc.§437c, subd. (p)(1).) Defendant has no burden until plaintiff produces admissible and undisputed evidence on each element of a cause of action. Until that time, plaintiff has not met its burden, and defendant has no burden to oppose. (Code Civ.Proc. §437c, subd. (p)(1).)

However, Summary Judgment may only be granted where it is shown that the "action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc. §473c, subd. (a).)

Plaintiff makes her due process claim pursuant to 42 U.S.C. §1983. In order to make out such a claim a Plaintiff must show, first that the defendant acted under color of state law and, second, that the acts deprived plaintiff of her particular rights under the laws of the United States. (*West v. Atkins* (1988) 487 U.S. 42, 48.) Defendants do not appear to contest that whatever actions are complained of were done under color of state law. Therefore, the question is whether Plaintiff can produce sufficient evidence of a deprivation of rights.

A procedural due process claim is composed of two elements: (1) the existence of a property or liberty interest that was deprived and (2) deprivation of that interest without due process. (*Bd. of Regents v. Roth* (1972) 408 U.S. 564, 569.)

Plaintiff claims that the legal interest here is the interest of a parent in the care, custody, and control of their children. (*Troxel v. Granville* (2000) 530 U.S. 57, 65.)

Plaintiff cites *Johnson v. Perry* (D.Conn.2015) 150 F.Supp.3d 222 for the proposition that a ban of a father from the school implicated a parent's fundamental right to make decisions for the child. (*Id.* at 229-30 (*quoting Troxel, supra,* 530 U.S. at 65).) Defendants cite to several cases that seem to hold that such a right does not exist or is, at least, very circumscribed. (*Coke v. Montague Bd. of Educ.* (3d Cir. 2005) 145 Fed.Appx. 760, 762-63; *Lovern v. Edwards* (4th Cir. 1999) 190 F.3d 648, 655-56.)

However, the Court need not determine whether the right exists at this juncture. The Court assumes without deciding that it exists and, instead, proceeds to the question of whether Plaintiff was afforded appropriate due process.

To determine the process due, the Court must balance three factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (*Matthews v. Eldridge* (1976) 424 U.S. 319, 335.)

California Penal Code §626.4 provides, in pertinent part:

> (a) The chief administrative officer of a campus or other facility of a community college, a state university, the university, or a school, or an officer or employee designated by the chief administrative officer to maintain order on such campus or facility, may notify a person that consent to remain on the campus or other facility under the control of the chief administrative officer has been withdrawn whenever there is reasonable cause to believe that such person has willfully disrupted the orderly operation of such campus or facility.

[¶]

(b) Consent shall be reinstated by the chief administrative officer whenever he or she has reason to believe that the presence of the person from whom consent was withdrawn will not constitute a substantial and material threat to the orderly operation of the campus or facility. In no case shall consent be withdrawn for longer than 14 days from the date upon which consent was initially withdrawn. *The person from whom consent has been withdrawn may submit a written request for a hearing on the withdrawal within the two-week period.* The written request shall state the address to which notice of hearing is to be sent. The chief administrative officer shall grant such a hearing not later than seven days from the date of receipt of the request and shall immediately mail a written notice of the time, place, and date of such hearing to such person. (emphasis added)

This appears to comport with the *Matthews* test insofar as: first, the right to access to school appears to be important, but limited, because it any exclusion is meant to be for just 14 days, only; second, the value of a pre-exclusion hearing also appears limited, given the limited period of the exclusion; and, third, any additional safeguards would seem to impair the school's interests in maintaining order in its schools.

This Court is additionally bound by the State Supreme Court's ruling on the constitutionality of the statute in *Braxton v. Municipal Court* (1973) 10 Cal.3d 138. There, the Court upheld the constitutionality of the statute against a due process and First Amendment challenge so long as the statute was directed at conduct by a person who "incited or engaged in conduct causing a substantial and material physical disruption of an educational institution by the commission of unlawful acts." (*Id.* at 153.)

The Court also stated that the issuance of an exclusion order, without a proper hearing, was valid "only when necessary to prevent significant injury to persons or property during an emergency occasioned by a campus disorder." (*Id.* at 154.)

While the events described by the parties may or may not rise to an "emergency occasioned by a campus disorder," Defendant has presented evidence that indicates that Plaintiff had a real and consistent practice of physical, or near-physical altercations with employees of the school and was possibly a "substantial and material physical disruption." Whether such evidence rises, in the final analysis, to an "emergency occasioned by a campus disorder," a reasonable jury could conclude that the events described by Defendants are such an emergency that would allow the Defendants to forego the pre-exclusion hearing.

As a result, Defendants have shown that there is at least a question of fact as to this cause of action. Therefore, the motion for summary adjudication is denied.

The foregoing ruling relies on only admissible evidence. The objections filed by the parties primarily go to the weight of the evidence and not their admissibility, therefore, all the objections are overruled.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 7/26/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

Tentative Rulings for Department 502

(20) **Tentative Ruling**

Re: ***Sagaser v. Arabian Villa, L.P. et al.***, Superior Court Case No. 16CECG00577

Hearing Date: **July 28, 2016 (Dept. 502)**

Motion: Demurrer to Complaint

Tentative Ruling:

To overrule the demurrers to the first, second and third cause of action. To sustain the demurrer to the fourth cause of action with leave to amend, with plaintiff granted 10 days' leave to file a first amended complaint. (Code Civ. Proc. § 430.10(e).) All new allegations in the amended complaint shall be set forth in **boldface** type.

Explanation:

First Cause of Action for Breach of Covenant of Quiet Enjoyment

The first cause of action alleges that in every lease arrangement there is a covenant of quiet enjoyment and that covenant of quiet enjoyment is also codified in Civil Code § 1927. (Complaint ¶ 40.) Having a proper basis to evict the tenants of Space 27, and failing to do so, defendants failed to take steps to ensure plaintiff enjoyed the covenant of quiet enjoyment. (Complaint ¶ 41.)

Defendants first contend that this allegation is false because defendants filed an eviction action on 9/21/15, and obtained a judgment for possession against the tenants of Space 27. (See RJN Exhs. A, B.)

While the allegation in paragraph 41 that defendants failed to evict defendants is not entirely correct, the cause of action also incorporates by reference all prior allegations, including the allegations that the tenants were violating the mobilehome park rules since May of 2014, and the mobilehome park received complaints about them on 7/11, 8/15, 8/18, 8/27, 9/16 and 10/13/2014. (Complaint ¶¶ 20-28.) Based on the failure to take action after these complaints, the Complaint alleges that defendants failed to take timely action against the tenants of Space 27. (Complaint ¶ 32, 33.) Read as a whole, the Complaint alleges that the failure to timely take action to evict the tenants of Space 27 breached the covenant of quiet enjoyment. The fact that over a year after receiving many complaints defendants finally took action to evict the tenants does not conclusively negate the allegations of the Complaint.

Defendants also argue that the first cause of action is barred by the terms of plaintiff's lease agreement. Paragraph 23 of the Lease Agreement states in relevant part:

> 23. WAIVER OF LIABILITY: The Park shall not be liable to Resident or his or her family for any damages by or from any act or negligence of any residents or their guests, or by any owner or occupant of adjoining or contiguous mobilehomes.

However, defendants cite to no legal authority in support of the argument that this waiver of liability provision bars plaintiff's breach of quiet enjoyment claim. Civil Code § 1927 partially codifies the implied covenant of quiet enjoyment: "An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same." (*Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 588-89.) "To be actionable, the landlords act or omission must substantially interfere with a tenants right to use and enjoy the premises for the purposes contemplated by the tenancy." (*Id.* at p. 839.) "The perpetrator of the interference with the tenants quiet enjoyment need not be the landlord personally. There may be an actionable breach where the interference is caused by a neighbor or tenant claiming under the landlord." (*Id.* at pp. 839-840.)

Plaintiff is seeking to impose liability on the defendants directly for the actions of the tenants in Space 27. Rather, he is seeking damages for defendants' failure to take timely action to ensure that the covenant of quiet enjoyment was not breached. The lease language makes no reference to the implied covenant of quiet enjoyment. Defendants have now shown that the waiver of liability clearly negates the first cause of action.

Second Cause of Action for Retaliation

The Complaint alleges that prior to the events set forth in this lawsuit, plaintiff had complained to the management of the mobile home park that the mobile home park was engaged in the illegal towing of vehicles. Plaintiff sued defendants in small claims court, and the matter was settled. Plaintiff alleges that defendants' failure to evict the tenants in Space 27 was in retaliation for plaintiff's prior complaint and small claims suit. (Complaint ¶¶ 45, 46.)

Plaintiff adds that defendants' conduct violated Civil Code § 798.87 of the Mobilehome Residency Law, which provides that "[t]he substantial failure of the management to provide and maintain physical improvements in the common facilities in good working order and condition shall be deemed a public nuisance." (Complaint ¶ 50.)

Plaintiff also alleges that defendants' acts violated Civil Code § 1940.2(3), which provides that it is unlawful for a landlord, for the purpose of influencing a tenant to vacate a dwelling, to "[u]se, or threaten to use, force, willful threats, or menacing conduct constituting a course of conduct that interferes with the tenant's quiet

enjoyment of the premises in violation of Section 1927 that would create an apprehension of harm in a reasonable person."

In their memorandum in support of the demurrer to the second cause of action, defendants focus solely on the allegations of retaliation. They fail to address the alleged Civil Code violations and thus Defendants fail to address all allegations that might provide relief to plaintiff in the second cause of action. A general demurrer may be upheld "only if the complaint fails to state a cause of action under any possible legal theory." (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998.) Defendants have not shown that the second cause of action fails to state a cause of action under any of the theories alleged therein.

Third Cause of Action for NIED

The third cause of action for negligent infliction of emotional distress alleges that the conduct alleged previously in the complaint was extreme and outrageous conduct.

Defendants point out that there is no independent tort of negligent infliction of emotional distress. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965) "[T]here is no duty to avoid negligently causing emotional distress to another." (*Id.* at p. 984.) Thus, "unless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 555) The tort is negligence, a cause of action in which a duty to the plaintiff is an essential element. (*Potter* at p. 984.)

After reciting these legal principles, defendants simply claim that plaintiff failed to allege the elements of duty and breach of that duty in the third cause of action. As defendants point out, that duty may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship. (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 590)

The preceding allegations of the Complaint, incorporated by reference into the third cause of action, allege numerous contractual and statutory duties owed by defendants, including the implied covenant of quite enjoyment and Civil Code §§ 1927, 1940.2, 798.85, 798.86 and 798.87. Plaintiff has also alleged breach of those duties by not timely seeking legal redress against the tenants in Space 27. This is sufficient to allege a duty and breach.

Fourth Cause of Action for IIED

The fourth cause of action for intentional infliction of emotional distress incorporates by reference all prior allegations, and adds only paragraph 59:

> As a proximate result of the wrongful conduct of DEFENDANTS in doing the acts herein alleged, DEFENDANTS acted with oppression, fraud, malice,

and in conscious disregard of the rights of Plaintiff, and Plaintiff is therefore entitled to punitive damages according to proof at the time of trial.

"The elements of the tort of intentional infliction of emotional distress are: '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.'" (*Christensen v. Superior Court* (1991) 54 Cal. 3d 868, 903, internal citation omitted.)

The allegations for the fourth cause of action are insufficient and overly conclusory. For the purpose of testing the sufficiency of the cause of action, the demurrer admits the truth of all material facts properly pleaded (i.e., all ultimate facts alleged, but not contentions, deductions or conclusions of fact or law). (*Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 966-967.) Plaintiff alleges no facts intended to show that the defendants' conduct was extreme and outrageous, or done with intent to cause, or conscious disregard of the probability of causing, plaintiff emotional distress.

Sanctions

In the opposition plaintiff requests sanctions under Code of Civil Procedure § 128.7, contending that defendants' demurrers are simply an attempt to delay these proceedings.

Even where a demurrer is wholly unsuccessful, sanctions would not be warranted. Moreover, the request for sanction sunder section 128.7 is clearly procedurally improper. A motion for sanctions under that statute must be made separately from other motions, and the motion may not be filed until 21 days after it has been served. (Code Civ. Proc. § 128.7(c)(1).)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 7/26/16 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Gonzalez et al. v. Vemma Nutrition Company et al.***
Case No. 14CECG00134
Alonzo et al. v. Vemma Nutrition Company et al.
Case No. 14CECG01023
Martinez v. Vemma Nutrition Co. et al.
Case No. 14CECG01715
Smith v. Union Pacific Railroad et al.
Case No. 14CECG02314

Hearing Date: **July 28, 2016 (Dept. 502)**

Motion: Debra Smith's Motion to Strike

Tentative Ruling:

To grant and strike Vemma Nutrition Co.'s Amendment to Substitute True Name for Fictitious Name" substituting Debra Smith for Doe 1, filed on April 5, 2016. (Code Civ. Proc. § 436.)

Explanation:

Plaintiff Debra Smith filed her Complaint against Vemma on August 8, 2014. Pursuant to Code of Civil Procedure section 428.50, any cross-complaint against Debra should have been filed and served at the time Vemma filed its answer. Vemma filed its answer on November 5, 2014, but no cross-complaint against Debra. On 12/5/14 Vemma filed a cross-complaint for indemnification, apportionment of fault and declaratory relief against the Estate of Michaela Smith and Does 1-50.

On April 5, 2016, Vemma filed an "Amendment to Substitute True Name for Fictitious Name," substituting Debra for Doe 1.

Code of Civil Procedure Section 474 provides:

> When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly …

Vemma explains that the amendment was filed at that time because for the first time at Debra's deposition on March 23, 2016, Vemma discovered facts that would support a claim against Debra for negligently entrusting to Michaela the vehicle owned by Debra. Vemma relies on these new facts in support of its argument that it did not unreasonably delay filing the Doe amendment. (See *A.N. v. County of Los Angeles* (2009) 171 Cal.App.4th 1058, 1066-1067 ["a plaintiff may not 'unreasonably delay' his or her filing of a Doe amendment after learning a defendant's identity"].)

While this may support the contention that there was no unreasonable delay, the discovery of these new facts demonstrates that Debra was not an intended defendant at the filing of the Cross-Complaint.

The newly-named, previously-unidentified defendant must have been contemplated as a defendant at the time the pleading was filed. (*Scherer v. Mark, supra*, at 842-843 ["It seems equally reasonable that the same bar should apply to a new but tardy action where no effort is made to identify the newly named defendant as one of those named as Doe in the original complaint."].)

Vemma knew of Debra's identity from the beginning. Vemma alleges that the "incident and all of the injuries and damages complained of were caused directly and proximately by Cross-Defendants thereby breaching duties owed to Vemma Nutrition Company." (Cross-Complaint ¶ 6.) Vemma is not simply adding a contemplated but unidentified defendant. It has discovered that it has a cause of action against an already known party to this action based on a theory (negligent entrustment) not articulated in the Cross-Complaint. Therefore, Vemma should have sought leave to amend the Cross-Complaint pursuant to Code of Civil Procedure section 428.50, subdivision (c).

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 7/26/16 .
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Frias v. Community Behavioral Health Center***
Superior Court Case No.: 14CECG01780

Hearing Date: July 28, 2016 (**Dept. 502**)

Motion: By Defendant Fresno Community Hospital and Medical Center, operator of Community Behavioral Health Center for summary judgment or, in the alternative, summary adjudication

Tentative Ruling:

To deny. The Court has, in its discretion, considered the late-filed opposition. (Cal. Rules of Court, rule 3.1300.)

Explanation:

"A defendant…has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., §437c, subd. (p)(2).) In addition to the lack of supervision of Carlos Jesus Garcia, the complaint contains detailed allegations that Defendant didn't create a care plan for Decedent concerning her pain management needs and that she suffered needless pain because she was not given pain medication. Unlike for a typical wrongful death cause of action, Decedent's pain and suffering would survive her death for the elder abuse cause of action. (*Quiroz v. Seventh Avenue Center* (2006) 140 Cal.App.4th 1256, 1265.) None of Defendant's facts deal with these allegations.

The moving party's evidence must be directed to the claims or defenses raised in the pleadings. (*Keniston v. American National Insurance Co.* (1973) 31 Cal.App.3d 803, 812.) If a plaintiff pleads several theories, the defendant has the burden of demonstrating that there are no material facts requiring trial on any of them. A moving defendant whose declarations omit facts as to any pleaded theory permits that portion of the complaint to be unchallenged. (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 162-163.)

In any event, there is a triable issue concerning causation. (Code Civ. Proc., §437c, subd. (g).)

The declaration of Jeanne Templeman, R.N., C.N.S., L.C.S.W., is to the effect that Defendant Fresno Community Hospital and Medical Center, operator of Community Behavioral Health Center ("Defendant"), had notice that the patient who attacked Decedent at its facility posed an imminent danger to other patients and at that time

either should have been placed him in on one-on-one monitoring, placed him in seclusion, and/or restrained him. (Decl. of Jeanne Templeman, R.N., C.N.S., LCSW, ¶9, see also ¶8.)

The declaration of Ari Baron, M.D., is to the effect that although it was within the standard of care for the hospital to withhold Decedent's anti-coagulant medication prior to and shortly after Decedent's surgery, that Decedent suffered the pulmonary embolism as a result of the surgical procedure. (Decl. of Ari Baron, M.D., ¶¶9-13.) But for the assault, Decedent would not have required surgery.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 7/26/16 .
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Danielson v. La Jolla Group***
Superior Court Case No.: 08CECG04387

Hearing Date: July 28, 2016 (**Dept. 502**)

Motion: By Plaintiffs for final approval of class action settlement and for approval of attorney's fees and costs to class counsel

Tentative Ruling:

To grant, the Court will execute the proposed judgment which has been submitted.

The final "continued 225 dismissal" hearing will be heard December 27, 2016, at 3:30 p.m., in Dept. 502, instead of the currently set time. Plaintiffs are to file a final declaration concerning the status of the completion of all injunctive relief items contemplated in the judgment no later than December 16, 2016.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 7/26/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 503

(6)

Tentative Ruling

Re: ***B.E. Giovannetti & Sons v. Frater***
Superior Court Case No.: 14CECG02589

Hearing Date: July 28, 2016 (**Dept. 503**)

Motion: Default prove up

Tentative Ruling:

Plaintiff must bring to the hearing, documentary evidence to provide proof that Plaintiff paid all taxes levied and assessed on the property during the five years prior to September 4, 2014, as well as someone who is knowledgeable about the documents and how they are prepared to lay a foundation for their introduction.

Plaintiff must also bring a proposed judgment to the hearing.

Explanation:

To establish title by adverse possession, the claimant must prove the following facts: (1) The claimant occupied the land for a minimum period by actual occupancy in circumstances providing reasonable notice to the owner (in other words, open and notorious occupancy); (2) The claimant's occupancy was continuous and uninterrupted for five years (prescriptive occupancy); (3) The claimant's occupancy was under color of title or claim of right (proprietary occupancy); (4) The claimant's occupancy was exclusive and hostile to the owner's title (hostile occupancy); (5) The claimant together with predecessors and grantors paid all taxes levied and assessed on the property during the prescriptive period. (*Dimmick v. Dimmick* (1962) 58 Cal. 2d 417, 421-422.)

While the declaration of John Giovannetti is sufficient to establish the first four elements of adverse possession, some type of documentary evidence is necessary to demonstrate that Plaintiff B.E. Giovannetti & Sons has paid all taxes levied and assessed on the four parcels during the five years prior to September 4, 2014, the date the original complaint was filed. Paid bills would be sufficient, provided that a witness appears at the hearing to testify as to the documents and how they are prepared, and in what manner they show payment of the taxes; in other words, how the property taxes were paid. In doing so, Plaintiff must comply with Evidence Code section 1271. The witness need not be the custodian or the person who created the record in order to lay a foundation for their introduction. (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 324.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order

adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 7/26/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re:	***Riddle et al. v. Community Medical Centers et al.*** Superior Court Case No. 14 CECG 02360
Hearing Date:	July 28, 2016 **(Dept. 503)**
Motions:	By Plaintiffs to compel further responses to Request for Production of Documents aka Inspection Demands Set Two

Tentative Ruling:

To deny the motion on the grounds that the moving party has failed to comply with CCP § 2031.310(c).

Explanation:

On April 1, 2015 Plaintiffs propounded and served Request for Production of Documents aka Inspection Demands Set Two upon Defendant Chaudhry through service upon his counsel of record. On July 1, 2015, Defendant served timely responses. See Declaration of Bulger at ¶¶ 3-4. On October 7, 2015, Plaintiffs' counsel wrote to Chaudhry's counsel in an attempt to "meet and confer." The attempt was unsuccessful.

On December 10, 2015, Plaintiffs' counsel filed a request for a pre-trial discovery conference. On December 21, 2015, Defendant's counsel filed opposition. On March 25, 2016, the court denied the request for a pre-trial discovery conference and granted Plaintiffs' permission to file a motion to compel further responses. The Court tolled the time to file for 180 days. See Declaration of Bulger at ¶¶ 11, 13 and 15 filed in support of the motion.

On June 7, 2016 Plaintiff filed a motion to compel further responses. Opposition was filed followed by a reply.

Merits

As a matter of law, a motion to compel further response to inspection demands must be served within 45 days after service of a verified response (extended if served by mail, overnight delivery or fax or electronically; see CCP §§ 1010.6(a)(4), 1013.). *Otherwise, the demanding party waives* the right to compel any further response to the CCP § 2031.010 demand. [CCP §§ 2031.310(c), 2016.050; see *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 7454] The 45-day time limit is **mandatory and "jurisdictional"** (court has no authority to grant a late motion). [*Sexton v. Sup.Ct. (Mullikin Med. Ctr.)* (1997) 58 Cal.App.4th 1403, 1410] The 45-day deadline runs *from the date the verified response is*

served, not from the date originally set for production or inspection. [CCP § 2031.310(c); *Standon Co., Inc. v. Sup.Ct. (Kim)* (1990) 225 Cal.App.3d 898, 903]

In the instant case, the 45 day deadline had already passed between the time the responses were served on July 1, 2015 and the time when Plaintiffs' counsel began to "meet and confer" on October 7, 2015. Plaintiffs may argue that the Court's order on the request for the pre-trial discovery conference including a provision tolling the filing of the motion for 180 days. Local Rule 2.1.17 entitled "Resolution of Discovery Disputes states at Subsection A5:

> Filing a request for a Pretrial Discovery Conference **tolls** the time for filing a motion to compel discovery on the disputed issues *for the number of days between the filing of the request and issuance by the Court of a subsequent order pertaining to the discovery dispute.* The Court's order will specify the number of days the time for filing a motion is tolled.

The tolling provision is meant to address the requirement of the Local Rules to file a request for a pre-trial discovery conference as to certain discovery motions. It is meant to toll the time between the filing of the request and the hearing of the motion. It is counsel's responsibility to comply with the discovery statutes including the 45 day time limits for moving to compel further responses to inspection demands pursuant to CCP § 2031.310.

Ultimately, the motion at bench was already time-barred when the Plaintiffs began to "meet and confer" on October 7, 2015 let alone when they filed their request for the conference over 2 months later on December 10, 2015. It has been held that CCP § 2031.310 is jurisdictional. [*Sexton, v. Sup.Ct. (Mullikin Med. Ctr.)* supra.] See also *New Albertsons, Inc. v. Sup.Ct. (Shanahan)* (2008) 168 CA4th 1403, 1427-1428--missing the 45-day deadline waives the right to compel a further response to the demand (CCP § 2031.310(c)) or to compel inspection of any documents that might have been identified in such a further response (see CCP § 2031.320(a)). Therefore, the motion at bench will be denied.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 7/27/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Samsung SDS America, Inc. et al. v. Koo***
Superior Court Case No. 16 CECG 00390

Hearing Date: July 28, 2016 **(Dept. 503)**

Petition: Release Mechanic's Lien

Tentative Ruling:

To grant the Petition. The Clerk's Office is ordered to enter judgment in favor of Petitioners, Samsung SDS American, Inc. and Sprint PCS License, LLC which will release the mechanic's liens recorded as DOC—2013-0152959 and DOC—2013-0153371. The judgment includes an award of costs and attorney's fees to the Petitioners payable by Respondent Jan Huan Koo.

Explanation:

Background

On May 31, 2016, Samsung SDS America, Inc. and Sprint PCS License, LLC filed a verified Petition seeking a release of the mechanic's liens on 16300 Palmer Avenue, Huron, CA. The liens, in the amount of $17,850.59 were recorded in Fresno County by Respondent Jan Huan Koo on November 5, 2013. The two liens are identical except that one names Samsung SDS America, Inc. as owner of the property while the other names Sprint PCS License, LLC as the owner.

On June 9, 2016, the Respondent was personally served with the Petition. See Proof of Service filed on June 21, 2016. No opposition has been filed.

Merits

If a claimant has not commenced an action to enforce the mechanics lien within the time provided in Civil Code § 8460—90 days after recordation, the property owner may petition the court for an order releasing the property from the lien pursuant to Civil Code § 8480(a). At least 10 days before petitioning for a release order, the owner must give the claimant a notice demanding that the claimant execute and record a release of the lien claim. The notice must comply with the requirements of Civil Code § 8100 et seq. and state the grounds for the demand. [Civil Code § 8482.]

On filing a verified petition for a release order [Civil Code § 8484], the clerk must set a hearing date not more than 30 days after the filing of the petition. The owner must

serve a copy of the petition and notice of hearing on the claimant at least 15 days before the hearing. [Civil Code § 8486]

Here, the Petitioners have met the burden of proof pursuant to Civil Code § 8488(a). The Petition will be granted and judgment will be entered in favor of the Petitioners releasing the liens. The Respondent is ordered to pay the Petitioners the amount of $2762.50 for costs and attorney's fees.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 7/26/16 .
(Judge's initials) (Date)